

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

GEORGE GUY DERDEN

PETITIONER

v.

CIVIL NO. 1:95CV43-D-D

EDWARD HARGETT, ET AL.

RESPONDENTS

MEMORANDUM OPINION

On consideration of the file and records in this action, and on remand from the Fifth Circuit Court of Appeals, the United States Magistrate Judge issued a report and recommendation dated October 15, 1997, recommending that petitioner's request for writ of habeas corpus be granted. Such recommendation was on that date duly served upon the attorneys of record for the petitioner and the attorney of record for the defendants. Defendants timely filed objections to the report and recommendation. Having considered the objections, the court is nevertheless of the opinion that the report and recommendation should be approved and adopted as the opinion of the court. This court is of the opinion that the petitioner's right to due process was violated when the truthful testimony of a government witness created a false impression that served to conceal the true nature of that witness's plea bargain.

I. Procedural and Factual Background

This §2254 case is on remand from the United States Court of Appeals for the Fifth Circuit with instructions to develop an adequate record on and assess the merits of petitioner's facially nonfrivolous *Giglio* claim. More precisely, the issue at hand is whether *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), was violated by the alleged failure of the prosecution and its witness, Shirley Pennington, to reveal the true nature of her plea bargain

agreement with the State. This court previously agreed with the Mississippi Supreme Court ruling that the issue was procedurally barred.

An evidentiary hearing was held in this case on June 16, 1997, with petitioner represented by both court-appointed and retained counsel. In June 1998, Petitioner moved to return to *pro se* status. This court finds the motion well-taken and shall grant Derden's motion to proceed *pro se*.

On February 17, 1988, George Guy Derden was convicted in the Circuit Court of Lowndes County, Mississippi, of attempted armed robbery and sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. His conviction and sentence were affirmed in February 1991 by the Mississippi Supreme Court on direct appeal, and his subsequent motion for post conviction relief was denied. *Derden v. State*, 575 So.2d 1003 (Miss. 1991), *cert. denied*, 112 S.Ct. 94 (1991). Raised in this post conviction motion was the issue presently before the court, which the Mississippi Supreme Court found to be procedurally barred.<sup>1</sup>

The factual background as developed at Derden's trial and recited by the Fifth Circuit opinion showed that Pennington, Derden and William Edwards met on August 23, 1984, to plot the robbery of the El Rancho Motel in Columbus with accomplices Jessie James Ingram and Will

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<sup>1</sup>The Fifth Circuit expressly rejected the procedural bar the Mississippi Supreme Court imposed. It held that the facts giving rise to this claim were neither known by nor reasonably available to Derden until Pennington pleaded guilty to simple robbery after Derden filed his direct appeal. *Derden v. Anderson, et al.*, No. 95-60782 (5th. Cir., Dec. 24, 1996). See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 814, 108 S.Ct. 2177, 100 L.Ed.2d 811 (1988) (“[W]hen a court decides upon a rule of law that decision should continue to govern the same issues in subsequent stages of the same case.”). This doctrine applies to all “issues which were decided either explicitly or by necessary implication” in the prior decision. *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5<sup>th</sup> Cir. 1981). Therefore, the portion of respondents' objections pertaining to the procedural bar issue need not be discussed.

Sherrod. The robbery did not go as planned. Ingram was killed by the motel desk clerk, and Pennington and Edwards were soon arrested in Alabama and confessed.

On December 20, 1984, Pennington, under indictment for capital murder and facing charges of attempted armed robbery and burglary, agreed to testify as a prosecution witness. In exchange for her testimony against Derden, the government agreed to recommend to the court the following:

The State of Mississippi will recommend to the Court that Ms. Pennington receive a ten (10) year sentence with the Mississippi Department of Corrections on a reduced charge of Armed Robbery. It will further recommend that this sentence run concurrently with any Federal sentence Ms. Pennington will receive so that her life will not be in jeopardy by being confined with the persons she testified against. The State of Mississippi would reserve the right to make a lesser sentence recommendation depending on the sentences imposed on the other persons and depending on the factual situation at the time of sentence, but the sentence recommendation would be no higher than set forth above. Any other pending charges are to run concurrently with the ten (10) years.

(Pennington's Plea Agreement).

Derden's first trial in February 1987 resulted in a hung jury. He was retried in February 1988. Sometime after entering into the plea agreement, but before Derden's first trial, Pennington's agreement was modified to reflect that the state would recommend an eight year rather than a ten year sentence. The State agreed to reduce the charge from attempted armed robbery to simple robbery although the language in the agreement was incorrect and provided that Pennington be charged "on a reduced charge of armed robbery."

Both Pennington and Sherrod, testified for the State in the second trial against Derden. When asked about her plea agreement, Pennington declared, "I have an agreement with the State for no more than eight years." In the second trial, Derden was convicted.

Approximately ten months after Derden's conviction, Pennington appeared before Judge

Harvey Buck for her plea and sentencing. At Pennington's hearing the government reduced the charge in her indictment from attempted armed robbery to robbery and recommended to the court that Pennington receive a sentence no greater than eight years. However, the court rejected the prosecution's recommendation and sentenced Pennington to ten years in prison, suspending the ten years and sentencing her to five years' probation. This plea and sentencing occurred within days after Derden's direct appeal was filed.

## II. The *Giglio* Claim

In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), a member of the prosecution staff had, without authorization of the department and unknown to the prosecutor handling the trial, made an offer of immunity to Giglio's co-conspirator, Robert Taliento. Taliento testified under cross-examination at Giglio's trial that such a promise had not been made. The court held that this material was disclosable to the defendant, thus requiring a new trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). "Taliento's credibility as a witness was therefore an important issue in the case, and the evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it." *Giglio*, 405 U.S. at 154.

The State's failure to declare to the jury and to the defendant the existence of any agreements, promises or understandings made with key government witnesses deprives a defendant of due process of law. *United States v. Barham*, 595 F.2d 231, 241 (5<sup>th</sup> Cir. 1979) ("It is . . . immaterial whether the false testimony directly concerns an essential element of the Government's proof or whether it bears only upon the credibility of the witness."). Suppression

of material evidence mandates a new trial “irrespective of the good faith or bad faith of the prosecution.” *Id.* at 153.

“A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury.” *United States v. Anderson*, 574 F.2d 1347, 1356 (5<sup>th</sup> Cir. 1978). The Fifth Circuit elaborated upon the standard in *United States v. Barham*. “[T]his ‘reasonable likelihood’ standard of materiality is a ‘low threshold’ standard . . . . It is a brother, if not a twin, of the standard (‘harmless beyond a reasonable doubt’) for determining whether constitutional error can be held harmless.” *Barham*, 595 F.2d at 242 (quoting *Anderson*, 574 F.2d at 1356).

In addition, technically correct yet seriously misleading testimony falls within the concerns of possible due process violations. *Id.*; see *United States v. McClintic*, 570 F.2d 685, 692 (8<sup>th</sup> Cir. 1978); *Boone v. Paderick*, 541 F.2d 447, 450 (4<sup>th</sup> Cir. 1976), *cert. denied*, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977). “[I]t is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.” *Naupe v. Illinois*, 360 U.S. 264, 269. 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959).

Although Pennington’s written plea agreement was introduced into evidence at the criminal trial, Pennington herself did not testify about any reduction of charges, just her understanding that she would receive no more than eight years. The State conceded at Derden’s habeas hearing that in fact the agreement was to reduce the charge from attempted armed robbery to simple robbery and called the reference to a “reduced charge of armed robbery” in the written plea agreement “a clerical error.” Pennington’s attorney testified at the habeas hearing that he understood that her charge would be changed to simple robbery. When she testified at Derden’s

second trial, the State elicited her testimony that the deal had been changed, but only to the extent that they would recommend a sentence for no more than eight, rather than ten years for armed robbery.

Pennington was indicted on May 13, 1985, for attempted armed robbery. Therefore, armed robbery could not be a reduced charge of that offense. There exists no doubt, then, that the plea agreement introduced into evidence at trial was inaccurate. To compound the matter, the prosecutor in closing argument told the jury, “Shirley Pennington . . . will go to the penitentiary . . . Shirley Pennington is going to the Department of Corrections for eight years.” (Tr. 841, 845). The implication was that the penalty was fixed, not open to a greater or lesser sentence at the discretion of the judge, and certainly not bearing the possibility of probation.

The State argues that Pennington bargained for an eight-year sentence, she thought she would get an eight-year sentence and she testified she was to get an eight-year sentence. Therefore, there was no suppression of material evidence that would fall under the auspices of *Giglio*. This court disagrees and is of the opinion that the statements she made to the jury only strengthen the argument that evidence that she might receive probation was nonexistent.

The State also argues that Pennington’s testimony was not material evidence before the jury as there was other credible evidence linking Derden to the robbery. This court agrees with the Magistrate Judge’s opinion that this inaccuracy of charges is a material misrepresentation, because armed robbery carries a mandatory three year sentence, whereas a simple robbery carries with it the possibility of probation, the sentence Pennington actually received. *See Barham*, 595 F.2d at 242 (materiality standard is low threshold standard). Had defense counsel known the true nature of the plea agreement he could have pursued cross-examination to challenge the assertion

that she was going to serve eight years in prison. Had the jury known that Pennington could receive no time on her own charges in exchange for testifying against Derden, they may have viewed her testimony as less credible. *Contrast Cockrum v. Johnson*, 934 F. Supp. 1417, 1436 (E.D. Tex. 1996)(*Giglio* claim failed because defendant's counsel knew of parole implications but chose to avoid such issue on cross-examination).

In its determination, the *Giglio* court stated that suppression of material evidence warrants a new trial regardless of the good faith or bad faith of the prosecution. *Giglio*, 405 U.S. at 153; *Blankenship v. Estelle*, 545 F.2d 510, 513 (5<sup>th</sup> Cir. 1977); *Dupart v. United States*, 541 F.2d 1148, 1149-50 (5<sup>th</sup> Cir. 1976). Therefore it is of no consequence that the State argues that there did not exist a “real deal” between the prosecution and Pennington. Assuming that there was no undermining deal between the two, the fact remains that there exists a reasonable likelihood that Pennington's ability to receive a sentence of probation might have affected the judgment of the jury. Evaluating Pennington's potential impact in this case confirms that the failure to correct the plea agreement was material.

There is little doubt that the evidence in this case was sufficient to support a verdict of guilty. However, it is for a jury, not this court, to determine a defendant's guilt or innocence. “When the jury carries out its responsibilities, the defendant is entitled to a jury that is not laboring under a state sanctioned false impression of material evidence when it decides the question of guilt or innocence.” *Blanton v. Blackburn*, 494 F.Supp. 895, 901 (M.D. La. 1980).

Since credibility was especially important, the court cannot conclude that the jury, had it been given a specific reason to discredit the testimony of the key state witness, would still have

found that Derden's guilt had been established beyond a reasonable doubt. Therefore, Derden's conviction for attempted armed robbery must be vacated and set aside<sup>2</sup>. A writ of habeas corpus shall forthwith issue. Therefore:

IT IS ORDERED that petitioner's application for a writ of habeas corpus be and is hereby GRANTED.

IT IS FURTHER ORDERED that the conviction of George Guy Derden for attempted armed robbery be and hereby is vacated and set aside.

IT IS FURTHER ORDERED that the State of Mississippi is hereby given one hundred twenty (120) days to re-try the petitioner on the said attempted armed robbery charge. If the State fails to timely re-try the petitioner, petitioner shall be released from custody insofar as Mr. Derden's conviction for attempted armed robbery is concerned.

Judgment shall be entered accordingly.

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United States District Judge

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<sup>2</sup> On November 24, 1997, petitioner filed with this court a motion for bail. Insofar as this is not within the purview of this court's jurisdiction, the motion shall be denied. Since petitioner's conviction is now set aside, such a motion for bail would be appropriate should the State choose to prosecute him in the future.